Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-99

FRANK AMATO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FRANK AMATO,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Frank Amato, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 7, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra* (pp. A1-A7), is reported at 495 F. 2d 545.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1974, Appendix A, *infra* (p. A8). A timely petition for rehearing was denied on July 12, 1974. Appendix B, *infra* (p. A9). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a common crime against a small, local tavern constitutes a federal offense under the Hobbs Act, 18 U.S.C. §1951, and the Constitution of the United States merely because that local business obtained some of its stock in trade from a chain of suppliers that eventually involves interstate transactions.

2. Whether a conviction on a one-count indictment of conspiracy to obstruct commerce by extortion can be sustained, where eight defendants were named in the indictment, and where the trial pieced together evidence admissible as to each of the defendants named in the indictment, and where the trial judge entered judgments of acquittal as to three of the defendants, and the jury returned verdicts of not guilty as to two others, and the Court of Appeals reversed the conviction of a sixth defendant for insufficient evidence.

STATUTE INVOLVED

The Federal statutory provision involved, 18 U.S.C. §1951, is set forth in Appendix C, *infra* (pp. A10-A11).

STATEMENT OF FACTS

This is a prosecution under the statute familiarly known as the Hobbs Act, 18 U.S.C. §1951. Petitioner was indicted and tried in a single count indictment with seven other defendants for conspiring to obstruct interstate commerce by extortion. The trial was held in the United States District Court for the Southern District of Florida (Roettger, D.J.). Petitioner and two of the other seven defendants were found guilty. Petitioner was sentenced to imprisonment for a term of ten years. Of the other two convicted defendants, one received a twelve year prison sentence; the other was given a suspended sentence of seven years' imprisonment and placed on probation for five years.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed as to two of the defendants. The court (Brown, C.J.; Tuttle, Simpson, JJ.) concluded that there was insufficiency of proof of the crime charged against the co-defendant who had received the suspended sentence. Of the eight original defendants, thus, only petitioner and one other remain under judgment of guilt.[1]

[1]Of the remaining defendants, three were granted judgments of acquittal by the trial judge. (Tr. 837-38, 1235, 1272). The jury returned verdicts of not guilty as to two defendants. (Tr. 1343, 1344).

The indictment charged a conspiracy over a period of one year, commencing November 1, 1970, to extort money, goods and services from the owners of a restaurant and cocktail lounge known as "Oliver's" in North Miami, Florida. The Government's evidence concerning that period of time showed that petitioner and others were frequent patrons of "Oliver's" who, unlike most customers, were sometimes given credit. (Tr. 180, 182, 738, 739, 772). The Government argued, and the court below noted the argument, that the defendants did not ultimately pay all of these charges. Petitioner's Exhibit #1 at the trial was a composite of all the tabs or credit slips turned over to the Government; all but three had been paid and none, paid or unpaid, included the name of petitioner. (Tr. 230). There was testimony of one incident involving petitioner and others in which they received food and beverages without signing a tab and without subsequent payment of the group's bill for some $60.00. (Tr. 188, 592, 626).

There was also evidence that petitioner asked for employment at "Oliver's" as night manager (Tr. 430, 541). These requests were rejected by the owners, Frederick and Sheldon Arthur, and their mother Selma Arthur. One of the co-defendants, Fusco, also asked for and was refused employment. (Tr. 159-62). The District Court entered a judgment of acquittal as to Fusco for insufficient evidence.

These rejected requests for employment, the privilege of purchasing on credit and the very limited evidence of bills not subsequently paid are the gist of the "property" which the

Government contends the defendants obtained or sought to obtain in this case.

The only physical violence concerning petitioner concerned an incident on May 28, 1971. An altercation arose at the restaurant between the owners and Lawrence Weisburg over an $18.00 tab signed by the latter and unpaid for three weeks. (Weisburg was also charged in this indictment; the District Court subsequently granted a judgment of acquittal for lack of evidence. (Tr. 837)). In the brawl on May 28, Weisburg was severely injured by the Arthurs. (Tr. 165, 460, 684-91, 698, 700, 740-43, 946, 956). According to a stipulation between prosecution and defense, the beating inflicted upon Weisburg caused multiple rib fractures, a broken nose, a swollen left testicle and distended large and small intestinal loops, post trauma. (Tr. 1111).

Petitioner was not present when Weisburg suffered these injuries, but arrived at "Oliver's" shortly afterward. Petitioner and several others assaulted the two Arthur brothers who had injured Weisburg. Before the fighting began, petitioner declared that Weisburg was like a brother to him. (Tr. 168, 321, 409). Frederick Arthur was hospitalized for superficial injuries. (Tr. 302, 1141, 1153). This second brawl ended with the arrival of the police.

Later that evening, Selma Arthur, mother of Frederick and Sheldon, went to a neighboring cocktail lounge managed by Weisburg. (Tr. 419, 749). Petitioner was present and immediately apologized to her for what had happened and invited her to join him and others for a drink. (Tr. 419). Petitioner's brother, who was with the group, berated him for the assault on the Arthurs and said: "I'm surprised at you . . . you know Larry

Weisburg when he gets drunk." (Tr. 420). Petitioner apologized profusely to Selma Arthur. (Tr. 422).

At this point Sheldon Arthur entered with an automatic handgun in his trousers. (Tr. 424, 750). Co-defendant Brunella, whose conviction was reversed by the Court of Appeals, took the gun away from Sheldon Arthur. At Petitioner's request, the gun was given to Selma Arthur and she was asked to take Sheldon home. Sheldon testified that, as they were leaving, petitioner verbally threatened to "get" him. (Tr. 751).

In the weeks following this incident, petitioner suggested to Selma Arthur that he or Fusco be made night manager. (Tr. 173, 541). Petitioner told her that her son could not "handle a situation the way I can handle it. If I am here you won't have any more trouble." (Tr. 542). During this period, petitioner apologized again for the incident: "We are desperately sorry for what we did, we don't know how to tell you. We don't know how to apologize to you." (Tr. 426). During the same period, Sheldon and Selma Arthur testified, they received anonymous threatening telephone calls. (Tr. 523-24, 752).

After a month or two, petitioner was present in "Oliver's". A waitress testified that he said he was going to shoot Sheldon Arthur because "I don't like him. I come in here, he's not friendly to me. He doesn't talk to me." (Tr. 428).

Five months after the drunken brawl between Weisburg and the Arthurs and its sequel, another altercation occurred at "Oliver's". The evidence did not connect the two incidents, and

neither petitioner nor the other participants in the earlier brawl were present. (The only person identified in this September 28, 1971, fight, Peter Allen, (Tr. 188-89, 193, 589-90), was charged as a defendant in this indictment; the District Court ordered a judgment of acquittal on the charges against him. (Tr. 1272)). The fight on September 28 resulted in injuries to Frederick Arthur that required hospitalization and property damage to the restaurant. (Tr. 194-95, 588, 731, 877-79).

"Oliver's" was closed for about a month. Sheldon Arthur spoke to petitioner and co-defendant Lambert about reopening the restaurant. Lambert told him that it was "okay" (Tr. 762); petitioner, it was testified, warned him not to do so. (Tr. 763). The restaurant was reopened and sold by the Arthurs at a large profit (Tr. 764).

The factor that supposedly elevates this barroom brawling to a federal offense in the view of the courts below is the most ephemeral link to interstate commerce. The *entire* evidence on the relationship to commerce is in the brief testimony of two witnesses. One, the sales manager of a liquor supplier that sold goods to "Oliver's", testified that the supplier's inventory came from outside Florida. (Tr. 869). The other, an accountant for a meat company that sold meat to "Oliver's", testified that its meat came from outside Florida. (Tr. 872). Neither witness testified to the quantity of his firm's sales to "Oliver's", nor to the significance of "Oliver's" in the suppliers' business volume. The District Court charged the jury as follows:

"As to the second element of the offense charged,

namely, the showing of an effect of defendants' actions on interstate commerce, it is a question of law for the Court to determine what is or what is not interstate commerce. However, it is for you, the jury, to determine if the evidence of the witnesses that liquor and meat supplies were brought in from out of the state is to be believed, and is believed by you; if so believed by you, then the result is direct and substantial interference with or effect upon interstate commerce." (Tr. 1305).

As indicated above, the Court of Appeals for the Fifth Circuit affirmed convictions of petitioner and one other defendant, Lambert. The appellate court makes no use of the District Court's phrase of "direct and substantial interference with or effect upon interstate commerce." The Court of Appeals affirms on the ground that the evidence of the two suppliers is enough to show "an" effect on commerce.

REASONS FOR GRANTING THE WRIT

1. Whether a common crime against a small, local business constitutes a federal offense under the Hobbs Act, 18 U.S.C. §1951, and the Constitution of the United States merely because that local business obtained some of its stock in trade from a chain of suppliers that eventually involves interstate transactions.

The first question presented concerns a fundamental question of the scope of federal power under the Commerce Clause of the Constitution of the United States. The question goes to the

interpretation of a federal criminal statute which addresses the problem of "interference with commerce by threats or violence," 18 U.S.C. §1951. It has long been held that the scope of this statute, the Hobbs Act, extends to "all . . . commerce over which the United States has jurisdiction." Section 1951(b)(3). This case, along with a spate of other recent cases, poses the fundamental question of how attenuated the relationship to interstate commerce can become without overrunning the scope of the statute and violating the Constitution.

Although the statute here involved has been in force since 1934, it is only in very recent years that federal prosecutors have invoked it in petty, local criminal disputes represented by the instant case. The original statute, the Anti-racketeering Act, was overtly designed to reach predators preying on the flow of interstate commerce, or facilities of interstate commerce, often using the power of labor unions illicitly for private, personal gain.

The first reported decisions of the Courts of Appeals under the 1934 Act illustrate the kinds of abuses involved. In the earliest case, *United States v. Nick*, 122 F.2d 660 (8th Cir. 1941), cert. denied, 314 U.S. 687 (1941), labor officials extorted, or attempted to extort, large sums of money from exhibitors of motion picture films and to compel the exhibitors to purchase unwated services from a private business owned by the labor officials. A very similar extortionate scheme, prosecuted in New York, also involved systematic victimizing of producers and exhibitors of motion picture films. *United States v. Compagna*, 146 F.2d 524 (2d Cir. 1944), cert. denied, 324 U.S. 867 (1945).

And see *United States v. Bioff*, 40 F. Supp. 497 (S.D.N.Y. 1941).

Reflective of the scale of federal concern involved in the invocation of the 1934 statute was the fact that only the Attorney General and his assistants were permitted to represent the United States. E.g., Francis Biddle, Attorney General, appeared as counsel in the Second Circuit in *Compagna*. Special Assistants to the Attorney General and Assistant Attorney General Thurmond Arnold appeared in the Eighth Circuit in *Nick*.

During the first decade of the statute's existence, this Court gave its first review to the Act. Local 807 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America v. United States, 315 U.S. 521 (1942). This case, too, involved the use of the concerted power of labor unions. Their purpose was to compel trucking firms sending trucks into New York City to hire local drivers or to pay an amount equivalent to the wage of local drivers. This Court held that, even though the union had engaged in violent and coercive conduct, an exception in the 1934 Act for payment of wages to *bona fide* employees prevented conviction.[2]

This Court has subsequently considered this statute in three other cases. All involve issues of major labor strife. Following the decision in *Local 807*, Congress amended the 1934 Act to change the law. The amended statute, now known as the Hobbs Act, was invoked against a labor union and labor official in *Green v. United States*, 350 U.S. 415 (1956). An indictment charged the

union with extortion in seeking wages for imposed, unwanted, superfluous and fictitious services of "swampers" in the operation of equipment for maintenance work on a levee. The District Court had held that the indictment failed to set forth an offense. This Court, following the will of Congress in the 1946 amendment, reversed.

Four years after *Green*, this Court reviewed the conviction of a union officer for extorting some $31,000.00 by threatening labor strife against the supplier of the concrete that was being used in the construction of a steel processing plant. This Court reversed the conviction because the trial court had permitted introduction of evidence of involvement of interstate commerce that had not been charged in the indictment. The indictment had been limited to the fact that the concrete supplier obtained sand from interstate sources. Proof had been adduced that the steel processing plant under construction would eventually ship some of its output in interstate commerce. This Court found admission of that evidence reversible error. *Stirone v. United States*, 361 U.S. 212 (1960).

Just last year, this Court had its fourth and its last case under the Hobbs Act. Like those previously decided, it involved labor strife. The Government charged that violence by members and officers of a union during a strike against a utility company was criminal under the Act. This Court concluded that the statute does not proscribe use of force to try to achieve legitimate collective bargaining demands. *Emmons v. United States*, 410 U.S. 396 (1973).

Another set of cases prosecuted under the Hobbs Act deal with misuse of political power for private gain through extortionate schemes. One of these is from the 1940's, but the bulk have been brought to the point of a reported appeal in the late 1960's and 1970's. *United States v. Ladner*, 168 F.2d 771 (5th Cir. 1948), cert. denied, 335 U.S. 827 (1948); *United States v. Pranno*, 385 F.2d 387 (7th Cir. 1967); *United States v. Battaglia*, 394 F.2d 304 (7th Cir. 1968); *United States v. Amabile*, 395 F.2d 47 (7th Cir. 1968); *United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972); *United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1972), cert. denied, 405 U.S. 936 (1972); *United States v. Enmalfarb*, 484 F.2d 787 (7th Cir. 1973). None of the cases in this line has ever been reviewed by this Court.

There is a third line of cases under the Hobbs Act. The prosecution against petitioner is the latest example of the intrusion by the federal courts into controversies that have the thinnest relationship to interstate commerce. The first case in this line was decided as recently as 1967 in the Court of Appeals for the Ninth Circuit. The frequency of such prosecutions in the 1970's indicates that, unless this Court acts to review the matter, there will be a dramatic increase in the federal criminal jurisdiction and a wholesale incursion of federal process into areas cognizable under State law.

The 1967 Ninth Circuit case involved prosecution of the owner of a vending machine business who was charged with coercing a bowling alley operator into removing a competitor's pool table and installing one provided by the defendant. The Court of Appeals found the commerce requirement met in the

fact that the removed table had come from out of state originally. *United States v. Battaglia*, 383 F.2d 303 (9th Cir. 1967).

Two years later, a federal prosecution based upon coercion of a refuse remover to give up efforts to set up a business in a Connecticut city was upheld by the Second Circuit. *United States v. Tropiano, 418 F.2d 1069 [2d Cir. 1969], cert. denied, 397 U.S. 1021 [1970].*

In the past three and a half years, there have been ten cases reported in the Courts of Appeals, including petitioner's, on increasingly petty and local offenses. *United States v. Caldarazzo*, 444 F.2d 1046 (7th Cir. 1971), cert. denied, 404 U.S. 958 (1971); *United States v. DeMasi*, 445 F.2d 251 (2d Cir. 1971); *United States v. Augello*, 451 F.2d 1167 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972); *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972), cert. denied, 410 U.S. 969 (1973); *United States v. Nadaline*, 471 F.2d 340 (5th Cir. 1973); *United States v. Nakaladski*, 481 F.2d 289 (5th Cir. 1973); *United States v. DeMet*, 486 F.2d 816 (7th Cir. 1973); *United States v. Pacente*, 490 F.2d 661 (7th Cir. 1973); *United States v. Gill*, 490 F.2d 233 (7th Cir. 1973); *United States v. Amato*, 495 F.2d 545 (5th Cir. 1974).

Caldarazzo involved a common robbery. The victim was a jewelry salesman, who lost his samples. Since the salesman's territory covered several States, the Court of Appeals concluded that the robbery constituted a federal offense under the Hobbs Act.

DeMasi, like the present case, involved disturbance of restaurant and bar. The prosecution charged defendants with acts of violence that led to the closing of the club. As in the present case, the Court of Appeals found that interference with interstate commerce was demonstrated by the fact that the club's meat and liquor had originated out of state.

Augello is a startling case. The owner of a hamburger stand, known as Happy Burger's, was coerced into paying $100.00 for "protection." The Court of Appeals for the Second Circuit found that this depletion of the business's resources sufficiently affected interstate commerce to justify federal prosecution.

The defendant in *Mitchell*, a job developer for the Congress of Racial Equality, was convicted for coercing the owner of a retail outlet for television and phonographs to hire a black manager. The supposed interstate commerce nexus was the original source of the inventory of the store.

Nadaline arises from competition between businesses, carried on with force and coercion. The defendants were convicted for attempting to force a competitor to discharge a salesman who had left the defendants' employ to join the competitor.

Nakaladski involved loan sharking. The debtor owned a grocery store. Some of the store's inventory had originated out of state.

DeMet concerned police officers who received $100 in cash and liquor worth $300 through extortion against a cocktail

lounge owner.

Pacente and *Gill* both involve policemen extorting small sums of money from a tavern and liquor store.

In upholding convictions in these cases, the Courts of Appeals have stated some remarkable principles of federal jurisdiction. Early in the life of this statute, a District Court concluded that federal power could be asserted only if the prosecution involved substantial and material interference with interstate commerce. *United States v. Gramlich*, 19 F. Supp. 422 (S.D. Ill. 1937). In one of the few labor union extortion cases not reviewed by this Court, the Eighth Circuit said that exaction of tribute from contractors engaged in local construction work who are dependent upon interstate commerce for material, equipment and supplies, or who are engaged in constructing facilities for interstate commerce, is covered by the Hobbs Act. *United States v. Hulahan*, 214 F.2d 441 (8th Cir. 1954), cert. denied, 348 U.S. 856 (1954).

The *Stirone* prosecution stretched the principles previously recognized. The victim of the extortionate scheme was a concrete supplier for a steel processing plant. Going beyond the coercion focused on the concrete firm's dependence upon sand moving in interstate commerce, the prosecution admitted evidence that the steel plant would make products that would be sold across state lines. The steel plant was not a facility of interstate commerce. Judge Hastie dissented from the Court of Appeals' affirmance. *United States v. Stirone*, 262 F.2d 571, 578 (3d Cir. 1959).

> "Indeed, I understand the authoritative rule to be that where the conduct in question is an interference with a distinctly local business, there must be a substantial resultant demonstrable effect, the very antithesis of a speculative effect, upon interstate commerce to justify federal intervention under the commerce power." Id. at 579. As indicated earlier, this Court reversed the conviction on other grounds.

As the federal prosecutions in the late 1960's and 1970's have moved deeper and deeper into distinctly local affairs, the rationales used by the Court of Appeals have steadily attenuated the required connection with interstate commerce. In *United States v. Tropiano, supra*, the Second Circuit stated that the extortion or threats need affect interstate commerce only in a minimal degree. 481 F.2d at 1076. The same court carried this even fuarther in *Augello v. United States, supra:* " . . . it is enough that the extortion . . . affects commerce, though its effect be merely potential or subtle." 451 F.2d at 1169-70.

The Fifth Circuit, in its recent run of cases, has adopted the Second Circuit's principle that the impact of extortion needs to affect interstate commerce only in a minimal degree. *United States v. Nadaline, supra.*

The standard in the Seventh Circuit is the most extreme. According to that court, extortionate conduct "having an arguably *de minimis* effect" on interstate commerce may be punished. *United States v. Demet, supra; United States v. Gill, supra.* The adoption of this broad principle of federal power was

protested by Chief Judge Swygert as early as 1968. *United States v. Amabile*, 395 F.2d 47, 54 (7th Cir. 1968). He reiterated his concern about the unlimited reach of the court's doctrine in *United States v. DeMet*, 486 F.2d 816, 822 (7th Cir. 1973). Later, in *United States v. Gill*, 490 F.2d 233 (7th Cir. 1973), Chief Judge Swygert wrote: "With reluctance, the author accepts Judge Fairchild's opinion in DeMet as the law of the circuit." *Id.*, 236 n. 1.

This Court has never considered the drift protested by Judges Hastie and Swygert into a virtually unlimited theory of federal power to prosecute for crimes against property. The cases disclose that such drift is occurring and with increasing velocity. Meanwhile, the Courts of Appeals are trivializing the standards of effect upon interstate commerce in doctrinal terms that can only accelerate the process already visible. In a period when thoughtful people are seriously concerned about the burdens upon the federal system, the events that are occuring under the Hobbs Act certainly warrant the attention of this Court.

2. Whether a conviction on a one-count indictment of conspiracy to obstruct commerce by extortion can be sustained, where eight defendants were named in the indictment, and where the trial pieced together evidence admissible as to each separate member of those named in the indictment, and where the trial judge entered judgments of acquittal as to three of the defendants, and the jury returned verdicts of not guilty as to two others, and the Court of Appeals reversed the conviction of a sixth defendant for insufficient evidence.

The prosecution in this case is composed of a motley collection of bits and pieces of evidence that the Government strung together on a conspiracy theory. To spread the net widely, the indictment named eight individuals as alleged conspirators to obstruct interstate commerce. This combination allowed the introduction of a melange of testimony that related to one or several of the defendants, but not to all.

After trial and appeal, only two of the eight indicted defendants stand convicted. The evil in this procedure is plain. Neither of the convicted defendants had any part to play in the violence that caused "Oliver's" to close temporarily. That incident on September 28, 1971, involved on of the indicted defendants. That defendant is no longer in the case. Yet the temporary closing of "Oliver's" is the critical nexus to even the attentuated effect upon interstate commerce that the Court of Appeals found sufficient to ground federal jurisdiction. Moreover, the violence in that September incident, in which petitioner had no part, was the greatest in this case. The earlier drunken brawl which precipitated petitioner's actions on behalf of his beaten friend was not nearly so severe.

Whether the patchwork prosecution that the Government tried unsuccessfully to put together as to eight defendants is too threadbare to contain any of the remaining defendants is a question of basic fairness of federal criminal process that is deserving of review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted by this Court.

Respectfully submitted,

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APPENDIX A — OPINION AND JUDGMENT

UNITED STATES of America, Plaintiff-Appellee,

v.

Frank AMATO, Samuel Salvatore Brunello, Donald Lambert, aka Louis Lamberti, Defendants-Appellants.

No. 73-2069.

United States Court of Appeals, F ifth Circuit.

Appeals from the United States District for the Southern District of Florida.

Before BROWN, Chief Judge, and TUTTLE and SIMPSON, Circuit Judges.

TUTTLE, Circuit Judge:

Defendants-appellants, Amato, Lambert, and Brunello, were convicted by a jury under the Hobbs Act, 18 U.S.C.A. § 1951[1] for conspiring to obstruct interstate commerce by extortion achieved by physical violence and threats of violence. On appeal appellants allege numerous errors by the

1. This provision provides:
"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
"(b) As used in this section—
"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

district court. However, we find meritorious only the claim of insufficiency of evidence.[2]

Appellants were indicted with five other co-defendants. The indictment charged a conspiracy continuing over a period of one year, November 1, 1970 through November 1, 1971, to extort money, goods, and services from Sheldon, Frederick, and Selma Arthur and a family corporation, "Oliver's," which was a restaurant and cocktail lounge. The government alleged that the evidence demonstrated that the defendants first induced fear in the Arthurs by threatened and actual violence, and then attempted to obtain money and employment for themselves and others at Oliver's. While unsuccessful, the government argues that the defendants did obtain food, drink, and services without payment. Three of the eight co-defendants were granted judgments of acquittal by the district court. Two were found innocent by the jury. Appellants, Amato, Lambert, and Brunello, were found guilty.

The Hobbs Act applies to one who ". . . affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspire so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section . . . ."[3] Appellants assert, individually, that there was insufficient proof on the elements necessary for conviction, specifically: (1) Failure to show an effect on interstate commerce; (2) Failure to prove formation of a conspiracy; (3) Failure to demonstrate each appellant's

2. Among other errors urged were: (a) Denial of a fair trial by the conduct and hysterics of two prosecution witnesses; (b) Denial of motions for severance; (c) Admission of declarations by co-conspirators contrary to United States v. Puco, 476 F.2d 1099 (2d Cir. 1973), cert. denied, 414 U.S. 844, 94 S.Ct. 1067, 38 L.Ed.2d 82 (1973); (d) The jury instructions on intent; (e) Denial of cross-examination; (f) Designation of an improper time period for the conspiracy in the indictment; and (g) Discriminatory selection of grand and petit juries.

3. *See* the text of the Hobbs Act, 18 U.S.C.A. § 1951, quoted in note 1, *supra*.

intent to join the conspiracy; (4) Failure to prove a reasonable fear on the part of the victims.

INTERSTATE COMMERCE

The essence of appellants' interstate commerce argument is that the government's proof only discloses *intrastate* sales by wholesale liquor and meat suppliers, who purchased their goods from out-of-state, to Oliver's. Appellants contend that the flow of the interstate goods stopped with the supplier, therefore, the interruption eliminates the interstate nature and effect of any intrastate sale between Oliver's and the supplier's. Secondarily, appellants state that there is no evidence that the flow of goods to the supplier ceased or slowed down, affecting commerce, as a result of the conspiracy.[4]

[1, 2] This Court described the manner in which the interstate commerce requirement of the Hobbs Act had to be satisfied in United States v. Nakaladski, 481 F.2d 289, 298–299 (5th Cir. 1973):

> ". . . Under the Hobbs Act it is not necessary that the subject of the extortion constitute interstate commerce, or that the purpose of the extortion be to affect interstate commerce. All that is required is that trade be affected by extortion 'in any way or degree,' Carbo v. United States, 9 Cir. 1963, 314 F.2d 718, 732; *see* United States v. Addonizio, *supra*, 451 F.2d [49] at 77, and that the victim have been induced to part with property through the use of fear." *Id.* at 298.

It is clear that:

> "The impact of extortion need affect interstate commerce only in a minimal degree, United States v. Hyde, 5 Cir., 1971, 448 F.2d 815, cert. denied, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745." United States v. Nadaline, 471 F.2d 340, 343 (5th Cir. 1973).

4. *See* note 5, *infra*.

At trial the government called two witnesses who testified that their employers, one a liquor, the other a meat supplier, purchased their products from out-of-state sources. The government then offered documentary proof, i. e. invoices, that Oliver's purchased liquor and meat products from these suppliers. Finally, the government demonstrated that Oliver's was closed for a month because of the action and coercion of the conspirators.[5] From these facts, the court and the jury could reasonably infer an effect on interstate commerce.

The intermediate stop of the goods shipped interstate with the middle man supplier before receipt by Oliver's, does not make the effect on interstate commerce too attenuated. United States v. Pranno, 385 F.2d 387, 389 (7th Cir. 1967); Battaglia v. United States, 383 F.2d 303, 305 (9th Cir. 1967). Likewise, the evidence of the closing of Oliver's as a consequence of the conspiracy furnishes sufficient inferences of the reduction of sales from suppliers who purchased out-of-state products. United States v. DeMasi, 445 F.2d 251, 257 (2d Cir. 1971);[6] United States v. Pranno, *supra,* 385 F.2d at 389.

5. One factor causing the closing of Oliver's was the destruction of the furnishings and the beating inflicted upon Frederick Arthur by defendant Peter Allan and two unidentified men on September 28, 1971. However, defendant Allan was granted an acquittal by the court because of the government's failure to comply with the Jencks Act. Because of the acquittal, there might be some question of the competence of this evidence to support a conclusion of an effect on interstate commerce if it were the sole cause of the closing of Oliver's. However, the evidence revealing that Sheldon Arthur felt compelled to ask Lambert and Amato for permission to reopen Oliver's was sufficient for the jury to infer that other factors, in addition to defendant Peter Allan's actions, forced the closing of Oliver's.

6. In *DeMasi,* the court stated:
"With reference to the argument that the Government failed to prove an effect on interstate commerce, we note only that the Club purchased its meat in Connecticut and its liquor both nationally and internationally, and that when the Club closed these deliveries were stopped. The requisite effect was proven." *Id.*

APPELLANT BRUNELLO

While inadequate proof of the effect on interstate commerce would have invalidated all convictions, the alleged insufficiency of proof on the other elements of the conspiracy charge have had to be examined individually, as to each appellant. Having carefully reviewed the record we reverse the conviction of appellant Brunello, and affirm the convictions of appellants Amato and Lambert.

[3] Brunello moved for a judgment of acquittal at several points within the trial and at the close of evidence. In addition, he filed a motion notwithstanding the verdict pursuant to Fed.R.Crim.P. 29(c). The district court denied these motions. This Court has stated most recently in United States v. Jeffords, 491 F.2d 90 (5th Cir. 1974):

> "The test in a criminal case to determine whether there is sufficient evidence to submit the case to the jury is:
>
> > "On a motion for judgment of acquittal, the test is whether, taking the view most favorable to the Government, a reasonably-minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. Sanders v. United States, 5 Cir., 1969, 416 F.2d 194, 196; Jones v. United States, 5 Cir., 1968, 391 F.2d 273, 274; Weaver v. United States, 5 Cir., 1967, 374 F.2d 878, 881.
>
> "United States v. Warner, 5 Cir. 1971, 441 F.2d 821, 825, cert. denied, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971). *See also* Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1941); United States v. Stephenson, 5 Cir., 1973, 474 F.2d 1353." *Id.* at 91.

The government's case against Brunello is grounded on his involvement with one of the other appellants, Amato, and the Arthurs in two incidents occurring on *one* night, May 28, during the one year conspiracy. The first incident was Brunello's participation in an altercation at Oliver's. He was accompanying appellant Amato, who began the fight. Al-

though the testimony is conflicting on whether Brunello was aggressively aiding Amato or attempting to separate the participants and terminate the fracas, we must take the view most favorable to the government—that Brunello was an active aggressor. During the scuffle, Selma Arthur testified that Brunello warned her that if the police were called that next time both her sons would be killed. For that reason she later testified that she told the police that Brunello was not one of the perpetrators of the altercation. Later that evening, Selma Arthur followed Amato and Brunello to the Gold Doubloon, a neighboring cocktail lounge, to plead that no further injuries be inflicted on her sons. Sheldon Arthur then appeared. He had an automatic hand gun in the waist band of his trousers. Brunello yoked Sheldon around the neck, grabbed the pistol from him, and threatened him. At the request of Amato, Brunello then gave the pistol to Selma Arthur, and the Arthurs left.

[4–7] No formal agreement is necessary to establish a conspiracy, whose existence often is proved by inferences from the actions of the actors or circumstantial evidence of a scheme. United States v. Nadaline, *supra*, 471 F.2d at 344; United States v. Anderson, 352 F.2d 500 (6th Cir. 1965). The question arises, however, whether this single night's involvement is sufficient to prove Brunello's *intent* to join, or *knowledge* of, the conspiracy. The proof on conspiracy charges, in general, requires:[7]

7. *See* Roberts v. United States, 416 F.2d 1216, 1221 (5th Cir. 1969) ("In sum, we are left with an abiding conviction that the jury's verdict of guilty as to Bookout is based upon suspicion and surmise only. She associated with the wrong people and was convicted because of guilt by association only."); Wood v. United States, 283 F.2d 4, 6 (5th Cir. 1960) ("This record demonstrates that these appellants spent much of their time during the period of the alleged conspiracy in company with proven bootleggers. This fact, coupled with their game of 'cops and robbers' in and around the area in which several stills were later found creates a strong suspicion that they had more than a passing interest in the stills and their product. Mere suspicion is, of course, not sufficient to warrant the submission of a criminal case to a jury.").

"In order to establish a person as a participant in a conspiracy, the evidence must show that the accused intended to join and cooperate in the illegal venture. Knowledge that a conspiracy exists is a minimum requirement for establishing the requisite intent. 'Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal.' Direct Sales Co. v. United States, 319 U.S. 703, 711, 63 S.Ct. 1265, 1269, 87 L.Ed. 1674. *See* Daily v. United States, 9 Cir., 282 F.2d 818, 821–822. Association with an alleged co-conspirator may raise a strong suspicion of knowledge and intent, but this is not the only reasonable inference which may be drawn from such conduct." Miller v. United States, 382 F.2d 583, 587 (9th Cir. 1967).

[8] Selma Arthur testified that she had never seen Brunello before or after May 28th. There was no other evidence even portraying Brunello as an associate or close companion of the other conspirators. Both Selma and Fred Arthur testified that Brunello had never solicited free liquor or food, or sought credit, money or employment. In fact, the government has not shown that Brunello had any interest at all in the outcome of the conspiracy. United States v. Noah, 475 F.2d 688, 697 (9th Cir. 1973). Although any violence perpetrated by Brunello cannot be condoned and is reprehensible, the record is devoid of any element of intent to join in an extortion conspiracy in violation of the Hobbs Act. *See* United States v. Nedley, 255 F.2d 350, 357–358 (3rd Cir. 1958). In sum, we find that as a matter of law the evidence against Brunello on the issue of intent to join, or even knowledge of, the conspiracy was insufficient to submit the case to the jury.

The Judgments of Conviction of Amato and Lambert are affirmed.

The Judgment of Conviction and sentence of Brunello is reversed and the case is remanded to the trial court for the entry of a Judgment of Acquittal as to him.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUDGMENT
No. 73-2069

United States of America,

v.

AMATO, Et al.

On consideration whereof, it is now Ordered and Adjudged by this Court that the judgment of the said District Court be affirmed . . . .

Dated: June 7, 1974

APPENDIX B
ORDER ON PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

600 Camp Street
New Orleans, La. 70130

July 12, 1974

TO ALL COUNSEL OF RECORD

Re: 73-2069 U.S.A. v. AMATO, ET AL

Gentlemen:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH
CLERK
By s/ Anne G. Parent
Deputy Clerk

APPENDIX C

§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession

of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-99

FRANK AMATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to obstruct commerce by extortion, physical violence and threats of physical violence, in violation of 18 U.S.C. 1951; he was sentenced to a term of ten years' imprisonment. The court of appeals affirmed (495 F. 2d 545; Pet. App. A).[1] Petitioner contends that there was not a sufficient nexus between the conspiracy and interstate commerce to bring the conspiracy within Section 1951, and that his conviction must be reversed because two of his co-defendants were acquitted by the jury, the trial court entered judgments of acquittal for three other co-defendants, and the court of appeals reversed the conviction of a sixth co-defendant.

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[1]Donald Lambert, a/k/a Louis Lamberti, a co-defendant whose conviction was affirmed by the court of appeals, has moved the Court to adopt Amato's petition as his own. This motion was attached to Amato's petition.

1. The conspiracy for which petitioner was convicted was directed against the owners of a restaurant. The restaurant's food and liquor supplies were purchased from suppliers engaged in interstate commerce. As a result of the conspiracy, the restaurant closed for a month and its profits declined. Eventually the owners were driven out of business. Petitioner acknowledges that under the authority of numerous court of appeals' decisions these facts show a sufficient effect upon commerce to sustain the conviction (Pet. 12-17). Petitioner nevertheless urges this Court to excise from the reach of the statute those "petty" extortions and robberies that he believes ought to be unaffected by federal law. The statute, however, condemns extortions and robberies which "in any way or degree" affect commerce; as petitioner concedes, it "extends to 'all * * * commerce over which the United States has jurisdiction' " (Pet. 9). When a statute which reaches a "class of activities" is within the reach of federal power because it affects commerce, "the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States,* 402 U.S. 146, 154; see also *Maryland* v. *Wirtz,* 392 U.S. 183, 193. The operation of restaurants affects commerce, *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, and thus Section 1951 properly proscribes the acts perpetrated in the conspiracy. The complaint about the law's alleged overreach should be addressed to Congress.

2. Participants in the conspiracy induced fear in the restaurant owners by threats and actual violence as part of an unsuccessful effort to extort money and employment and a successful effort to extort food, drink and services at the restaurant without payment. Petitioner and Lambert were, however, the only defendants shown at trial both to have made threats (and, in petitioner's case, participated in acts of

violence) on the one hand, and to have participated in the successful and unsuccessful extortionate attempts on the other hand. The other defendants were shown to have participated in only one branch of the conspiracy; one defendant, moreover, was dismissed not because of insufficient evidence but because of the government's inadvertent failure to comply with 18 U.S.C. 3500. Petitioner and Lambert participated in both branches of the conspiracy, and the evidence was sufficient to convict them.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-99

FRANK AMATO, Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY MEMORANDUM

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UNITED STATES OF AMERICA.

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REPLY MEMORANDUM

The nature of the Memorandum in Opposition calls for a short reply.

There is *no evidence* in this case that the closing of the cocktail lounge for a month affected commerce in the slightest degree since the local suppliers did not testity that they stopped selling to the lounge or that their own purchases from their suppliers outside of Florida were in any way affected. The case was submitted to the jury by the trial court that if "supplies were brought in from out of the state . . . then the result is direct and substantial interference with or effect upon interstate commerce."

The evidence in the case must, of course, be adjudged in

terms of the charge of the district court in submitting the issues to the jury. *Grunewald v. U.S.*, 353 U.S. 391, 406.

The owners were not "driven out of business", as the government asserts, but, indeed, sold the cocktail lounge at an extraordinary large profit.

Furthermore, every enterprise, however localized, inevitably has some effect however remote on the flow of commerce. Hence the *de minimis* factor must intervene, otherwise the reach is boundless.

Respectfully submitted,

JACOB KOSSMAN
Counsel for Petitioner